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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FIRST ADVANTAGE INSURANCE, INC., *et al.*,
Petitioners,

v.

DOUGLAS D. GREEN,
COMMISSIONER OF INSURANCE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal for the First Circuit, State of Louisiana

RESPONDENTS BRIEF IN OPPOSITION

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RESPONDENTS BRIEF IN OPPOSITION

Respondents Douglas D. Green, Louisiana Commissioner of Insurance, the Louisiana Association of Life Underwriters, the Professional Insurance Agents of Louisiana, the Independent Insurance Agents of Louisiana (the last three collectively as the "Insurance Agents" and with the Commissioner as "Respondents") respectfully respond to Petitioners First Advantage Insurance, Inc. and First National Bank of Denham Spring's Petition For A Writ of Certiorari to review the judgment of the State of Louisiana's Court of Appeal for the First Circuit entered in this action.

STATEMENT OF THE CASE

The judgment entered by the state court of appeal is correct. Nevertheless, Respondents agree that the Louisiana state court's decision and the United States Court

of Appeals for the Eleventh Circuit's decision in *Barnett Bank of Marion County, N.A. v. Gallagher*, 43 F.3d 631 (11th Cir. 1995) (*reprinted in* Petition for Writ of Certiorari ("Cert. Pet.") Appendix ("Pet. App.") F at 79a-94a), *cert. petition filed* No. 94-1837 (May 8, 1995), conflict with the judgment entered by the United States Court of Appeals for the Sixth Circuit in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994) ("*Owensboro*") (*reprinted in* Pet. App. D at 50a-79a), *cert. petition filed* No. 95-74 (July 7, 1995). Petitions for Writs of Certiorari have now been filed in all three cases.[1] The issue is of significant importance to both the banking and insurance industries, and is likely to arise in other States. Indeed, a case is currently pending in a federal district court in Connecticut concerning the application of that State's restrictive insurance law to national banks. *See Shawmut Bank Connecticut, N.A. v. Googins, et al.*, No. 3:94CV146(RNC) (U.S.D.C. D. Conn.).

ARGUMENT

For the reasons delineated below, Respondents urge this Court to resolve the conflict by granting the Petition filed in the *Barnett* case and either denying the Petition filed herein or holding this Petition pending resolution of *Barnett*.

I. THE ISSUE PRESENTED.

As recognized by the courts and Congress, regulation of the insurance industry in this country has been reserved for the States. At issue in this case is the authority of the Louisiana Commissioner of Insurance (the "Commissioner") and other state insurance commissioners around the country to exercise their traditional police power to regulate the sale of insurance. The same fundamental question is at the heart of this case, *Barnett* and

[1] The Insurance Agents' counsel represent the insurance agent association parties in all three of these cases.

Owensboro: Who may regulate insurance activities, including determining which entities may be licensed to sell insurance in Louisiana and other States? Is the State Legislature the final determinant, exercising its authority through statutes implemented and enforced by the Commissioner of Insurance? Or can the federal government *sub-silentio* dictate how insurance activities are conducted in a State?

Like any other potential insurance agent, banks (and their subsidiaries) are subject to the licensing requirements of state law. A central provision of Louisiana law, LSA-R.S. 6:242(A)(6)(a), prohibits all banks from selling or soliciting the purchase of general forms of insurance. In addition, LSA-R.S. 6:121(B)(2), 6:242(A)(6), and 6:513 flatly prohibit bank holding companies and their subsidiaries, including state and national banks, from selling broad forms of insurance. In enacting these laws, the State of Louisiana, as the primary regulator of the business of insurance within the State of Louisiana, was forced to grapple with the difficult consumer protection issues posed by bank sales of insurance. The district court in *Barnett* discussed some of these problems at length:

> For example, in order to make a profit on automobile loans or home mortgages, the insurance agents may incur business they might otherwise reject because they would be pressured by the bank to do so in order to consummate the bank's loan transactions. This might lead to the over-insurance of risky business, which could result in the insolvency of the insurer.
>
> Additionally, and notwithstanding the existence of specific prohibitions on coercive credit extension, the Court finds that loan officers could steer customers to the bank's insurance agent for the purpose of suggesting the sale of insurance that is not needed, in order for the bank to make a profit on the insurance policy. The concern herein expressed is that an arms-length relationship be maintained among the bank,

> the loan officer and the insurance agents. The maintenance of this relationship is for the protection of the solvency of the insurance industry, and the prevention of coercion, which in turn protects all potential, present and future policyholders.

Barnett Bank of Marion Co. N.A. v. Gallagher, 839 F. Supp. 835, 842 (M.D. Fla. 1994), *aff'd*, 43 F.3d 631 (11th Cir. 1995) (*reprinted in* Pet. App. F). Many other States have made similar policy decisions to maintain some degree of separation between banking and insurance. Indeed, as Petitioners note, at least fourteen other States have laws like Louisiana's that restrict banks from being licensed to sell general forms of insurance.[2]

In their Petition for Certiorari, Petitioners argue that such licensing prohibitions are pre-empted by Section 13 of the Federal Reserve Act, 12 U.S.C.A. § 92 (1995 Supp.),[3] which otherwise permits a national bank "located and doing business in a place in which the population does not exceed 5,000 inhabitants" to act as an agent in the sale of general forms of insurance. The Louisiana Court of Appeal unanimously disagreed with Petitioners. The Court concluded that Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), dictates that Section 92—a law that regulates the business of national banks—may not be interpreted to supersede or pre-empt Fla. Stat. 626.988—a law "enacted for the purpose of regulating the business of insurance." *See* Pet. App. A.

II. THE McCARRAN-FERGUSON ACT—LEAVING REGULATION OF THE BUSINESS OF INSURANCE TO THE STATES.

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, makes clear, as a matter of federal law, that the

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[2] *See* Cert. Pet. at 8 & n.2.

[3] This provision is commonly known as "Section 92" and will be referred to as such herein. *See United States Nat'l Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 113 S.Ct. 2173 (1993) (discussing the tortured history of this provision).

States are the penultimate authority in the insurance realm unless Congress intentionally and expressly overrides that authority. Section 2(a) of McCarran is explicit:

> The business of insurance, *and every person engaged therein*, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

15 U.S.C. § 1012(a) (emphasis added). McCarran's Section 2(b) further provides that:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b).[4] This law, originally enacted in 1944, did not articulate a new federal policy but instead sought to ensure that the States were permitted to remain the primary regulators of the business of insurance.

Until 1944, it had been universally understood that the States maintained exclusive control over the regulation of insurance. *E.g., United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2207 (1993); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978). This axiom of state regulation had existed at least since 1869, when the Supreme Court decided *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). *Paul v. Virginia* involved an appeal by an insurance agent from a fine imposed for selling coverage for a New York insurer that was not properly licensed in Virginia. In disposing of the agent's argument

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[4] As even the "Declaration of Policy" provision of McCarran clarifies,

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that *silence on the part of the Congress shall not be construed to impose any barrier* to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011 (emphasis added).

that Virginia licensing laws violated the Commerce Clause of the U.S. Constitution, the Court held that "[i]ssuing a policy of insurance is not a transaction of commerce." *Id.* at 183. Cases following *Paul v. Virginia* held that not only the issuance of a policy, but the entire business of insurance, was *not* commerce regulable by Congress. *E.g.*, *Hooper v. California*, 155 U.S. 648, 649 (1895); *New York Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495, 506 (1913). Consistent with this case law, Congress had repeatedly refused to extend federal authority over the insurance business, concluding that the regulation of the insurance business was beyond Congress' power. *See, e.g.*, Sen. Rep. No. 4406, 59th Cong., 1st Sess. (1906); H.R. Rep. No. 2491, 59th Cong., 1st Sess., 12-25 (1906).

All this changed in 1944 with the United States Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), a case cited by the Louisiana Court of Appeal, by the Eleventh Circuit in *Barnett* and by the *Owensboro* dissent (but, notably, not by the *Owensboro* majority). In upholding a criminal indictment for alleged Sherman Act violations, the Court in *South-Eastern* held, for the first time, that an insurance company was subject to the federal antitrust laws. The decision "naturally, was widely perceived as a threat to state power to tax and regulate the insurance industry." *Fabe*, 113 S. Ct. at 2207. Congress reacted by enacting the McCarran-Ferguson Act. *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 299 (1960). McCarran restored oversight of the insurance industry to the States, except with regard to antitrust issues where a State had failed to act. 15 U.S.C. §§ 1011 *et seq.*

As this Court has explained, McCarran "transformed the legal landscape by overturning the normal rules of pre-emption":

> Ordinarily, a federal law supersedes any inconsistent state law. The first clause of § 2(b) reverses this by imposing what is, in effect, a clear statement rule, *a rule that state laws enacted "for the purpose of*

> *regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.*

Fabe, 113 S.Ct. at 2211 (emphasis added). Disagreement over the parameters of the first prong of this test—determining whether a state law was enacted "for the purpose of regulating the business of insurance"—has created the conflict this Court must now address.

III. THERE IS A SQUARE CONFLICT ON AN IMPORTANT QUESTION OF FEDERAL LAW.

Every court to consider the question has concluded that Section 92 does not "specifically relate to the business of insurance" under Section 2(b) of McCarran. *See* Pet. App. A at 25a-27a; *Barnett*, 43 F.3d at 637 (Pet. App. F at 93a-94a); *Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24, 36 (E.D. Ky. 1992), *aff'd on other grnds.*, 44 F.3d 388. There is complete uniformity on this point.

The conflict arises regarding the first inquiry under McCarran. The fundamental disagreement between the Louisiana state court and the Eleventh Circuit on the one hand, and the Sixth Circuit on the other hand, is whether state laws that exclude banks from being licensed to sell insurance are "enacted for the purpose of regulating the business of insurance." The Eleventh Circuit and the Louisiana Court of Appeal disagree with the Sixth Circuit both about whether such laws may be enacted "for the purpose of regulating the business of insurance" and about the proper test to make this determination.

The *Owensboro* majority, purporting to apply the standards developed by this Court in the course of construing McCarran's *antitrust* clause, *see Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), flatly held that "[e]xcluding a person from participation in an activity [] is different from regulating the manner in which it is conducted." *Owensboro*, 44 F.3d at 392 (Pet. App. D at 60a). Based on this holding, the *Owensboro* majority concluded that *any* state law that prohibits a bank from

being licenced to sell insurance *cannot* be a law enacted "for the purpose of regulating the business of insurance" within the meaning of McCarran. *Id.*

The Louisiana Court of Appeal and the Eleventh Circuit reached an opposite conclusion through the application of the test developed by this Court in *Fabe*. In *Fabe*, the Court emphasized that the scope of the first clause of Section 2(b) is significantly different from the antitrust clause to which the *Owensboro* majority looked. *See* 113 S. Ct. at 2210. The general pre-emption clause of McCarran is very broad and encompasses all state laws that have the "end, intention, or aim of adjusting, managing, or controlling the business of insurance." *Id.* at 2210 (citation omitted). In articulating this standard, the *Fabe* Court relied primarily on the only other Supreme Court decision addressing the provision, *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969). The *National Securities* Court had concluded that, at its core, the McCarran exemption broadly encompasses state laws "aimed at protecting or regulating th[e] relationship [between insurer and insured], directly or indirectly." *National Securities*, 393 U.S. at 460. Based on this, the *Fabe* Court held that the Ohio bankruptcy priority statute at issue was "enacted for the purpose of regulating the business of insurance" because it was "designed to further the interests of policyholders." *Fabe*, 113 S. Ct. at 2208, 2212.

Based on the factual record created before the trial court and state court case law interpreting the state law provision, the Eleventh Circuit concluded in *Barnett* that Florida's prohibition on bank licensure to sell insurance was enacted "for the purpose of regulating the business of insurance" because "it protects policyholders." *Barnett*, 43 F.3d at 636 (Pet. App. F at 91a). From this determination, the Eleventh Circuit concluded that, " '[u]nder the terms of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), therefore, federal law must yield to the extent the [state] statute furthers the interests of policyholders.' " *Id.* (quoting *Fabe*, 113 S.Ct. at 2208).

The Louisiana Court of Appeal adopted the Eleventh Circuit's reasoning to conclude that the Louisiana bank-insurance agent licensing prohibition also is protected from pre-emption by McCarran. *See* Pet. App. A at 24a-33a. In reaching this conclusion, the Louisiana court, like the Eleventh Circuit, relied upon this Court's *Fabe* analysis and on the *National Securities* Court's prior analysis of the parameters of McCarran's Section 2(b). Pet. App. A at 19a-24a. In dissent, Sixth Circuit Judge Batchelder argued that the *Owensboro* majority should have done the same. *See Owensboro*, 44 F.3d at 394-97 (Batchelder, J., dissenting) (Pet. App. E at 62a-78a).

The import of the Sixth Circuit opinion—reached without any meaningful review of the purpose underlying the enactment of the Kentucky provision—is to impose a blanket rule to the effect that such laws cannot be found to have been enacted for such a purpose. The Louisiana Court of Appeal and the Eleventh Circuit reached contradictory conclusions only after conducting complete reviews of Louisiana's and Florida's proffered purposes for enacting their licensing prohibitions. The Louisiana Court of Appeal and the Eleventh Circuit utilized a carefully considered analysis consistent with this Court's precedents and the federal policies embodied in the McCarran-Ferguson Act. The Sixth Circuit did not. . . . .

IV. RESOLUTION OF THIS SQUARE CONFLICT IS ESSENTIAL BUT *BARNETT* PROVIDES THE BEST VEHICLE FOR THAT RESOLUTION.

As noted by Petitioners and at the outset of this brief, the laws of at least 15 States preclude national banks from selling insurance under Section 92 absent pre-emption. Unless this Court resolves the conflict, the two States located in the Sixth Circuit that have such laws (Kentucky and Tennessee) appear to be precluded from applying them, while the one restrictive State located in the Eleventh Circuit (Florida) and the State of Louisiana will continue to enforce their prohibitions against national

bank insurance sales. There is no way to predict whether the other 12 States will be able to continue to enforce their prohibitions against national banks if challenged. A national bank in Connecticut already has initiated yet another action seeking a determination that the Connecticut prohibition on bank sales of insurance, as applied to national banks, is pre-empted by Section 92. *See Shawmut Bank Connecticut, N.A. v. Googins, et al.*, No. 3:94CV146(RNC) (U.S.D.C. D. Conn.). Other challenges will undoubtedly follow. This Court cannot permit different standards to be applied to national banks in each of these cases merely by virtue of their location in different States,[5] nor can it condone the uncertainty that has been created for both national banks and state insurance commissioners throughout the country by failing to resolve the conflict that now exists.

The *Barnett* case, however, provides the best vehicle for the Court to address this conflict because it is the only case in which a record regarding a State's purpose in enacting its licensing prohibition has been developed. It is therefore the only case in which the Court can fully examine the import of McCarran's "purpose" inquiry and adequately evaluate the Sixth Circuit's determination that laws which preclude designated classes of persons or entities from being licensed to sell insurance are not—as a matter of law—enacted for the "purpose of regulating the business of insurance."[6] The Solicitor General,

[5] Or to branches of the same national bank located in different states.

[6] Petitioners' argument that the Louisiana Court of Appeal's determination that Section 92 is "permissive" positions this case as the best of the three for review by this Court is meritless. Although the Louisiana Court of Appeal did characterize Section 92 in this manner, it nevertheless concluded, as both the *Barnett* district court and the *Owensboro* majority previously had done, that Section 92 *would* pre-empt State licensing prohibitions under a traditional pre-emption analysis. *See* Pet. App. A at 17a; *Owensboro*, 44 F.3d at 391 (Pet. App. E at 57a-58a); *Barnett*, 839 F. Supp. at 841. The Louisiana Court of Appeal's "permissiveness"

filing an *amicus* brief on behalf of the United States and the Comptroller of the Currency in support of the petition in *Barnett*, has urged the Court to resolve the issue in the context of that case.

CONCLUSION

For the foregoing reasons, the Insurance Agents respectfully urge this Court to deny Petitioners' Petition for a Writ of Certiorari or to hold that Petition pending final resolution of *Barnett*.

Respectfully submitted,

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statement had no apparent bearing on its decision and fails to distinguish this case from either *Barnett* or *Owensboro*.